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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

VINCENT JOSEPH
Petitioner

vs.

THE STATE OF CONNECTICUT
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF CONNECTICUT

Petitioner prays that a writ of certiorari issue to review the judgment of The Supreme Court of Errors of Connecticut dated May 5, 1964, entered in the above-entitled cause on May 19, 1964, as amended on May 26, 1964.

Opinion Below

The opinion of the Supreme Court of Errors of Connecticut is reported in 151 Conn. 592, 200 A.2d 724; a copy of the opinion is printed in the Appendix and a copy of the amendment to the opinion is printed in the Appendix, infra pages 7a, ~~14a~~ 15a.

Jurisdiction

The Judgment of The Supreme Court of Errors of Connecticut was dated May 5, 1964, entered May 19, 1964. A motion to reargue was filed May 20, 1964 and was denied May 26, 1964. Jurisdiction of this Court is invoked pursuant to 28 U.S.C., 1257 (3) which permits this Court to review cases from a state court in which there is a substantial federal question. On August 15, 1964 an Order Extending Time to File Petition for Writ of Certiorari was issued extending the time to file to and including October 15, 1964.

Statutes Involved

None.

Questions Involved

1. Is it violative of the 14th Amendment to the United States Constitution for a State Supreme Court to deny a hearing on the merits to an appellant in a criminal appeal for noncompliance with a rule of appellate procedure nonexistent at the time appellant was perfecting his appeal?
2. Is it violative of the 14th Amendment to the United States Constitution to deny a hearing to an appellant in a criminal appeal on the ground that no appendix was filed containing relevant evidence where the nature of the point raised would have required printing the entire transcript as such appendix and where appellant did file a certified copy of the entire trial transcript?

Statement of Facts

Petitioner and five other men were charged with the crime of Conspiracy to Obtain Money by False Pretenses. The defendants allegedly conspired to defraud insurance companies by staging a faked automobile collision and then filing fraudulent claims against the insurer covering the liability of the colliding vehicle. The State alleged that

the defendant Prete conspired with the other defendants, one of whom was petitioner, to arrange to collide with a vehicle containing the other defendants, which collision was to be and was in fact a rear-end collision, and that Prete was to and did receive a stipulated amount for his complicity. The state further alleged that the other defendants, including petitioner, did thereafter attempt to defraud the liability insurer of Prete's vehicle by filing false claims for injuries purportedly sustained in the said collision.

One of the six defendants, one George Kania, pleaded guilty and testified for the state. Trial was by jury and the jury's verdict was that the defendant Prete was not guilty, but that all of Prete's co-conspirator defendants were guilty.

Subsequent to the rendition of this verdict, petitioner's attorney filed a timely motion to set aside the verdict, claiming that the said verdict was "contrary to law" and "against the evidence." (Appendix, page 5a). This motion was denied. (Appendix, page 6a). The petitioner appealed and assigned as error the denial of defendant's motion to set aside the verdict. The pertinent assignment of error was phrased as follows:

> "The Court erred:
>
> 1. In denying the defendant's motion to set aside the verdict because the said verdict, as described in paragraph 100 of the Finding, was fatally inconsistent as a matter of law."
> (Appendix, page 7a)

Neither the petitioner-appellant nor the State of Connecticut filed a printed appendix setting forth that portion of the trial transcript germane to the assignment of error but both parties nonetheless argued in briefs and orally that the state of the trial evidence supported their respective positions. The petitioner-appellant did, however, file with the Clerk of the Supreme Court of Errors a certified copy of the entire trial transcript which was

part of the record available to the Supreme Court of Appeals on appeal.

The Supreme Court of Errors refused to consider petitioner's first assignment of error as one based upon the evidence adduced before the trial court and refused thereafter to rehear this point by denying petitioner's motion to reargue on May 26, 1964. The federal questions presented were first raised in petitioner's motion to reargue.

Reasons for Granting Writ

A. When petitioner filed his assignment of error directed at the trial court's denial of his motion to set aside the verdict, he was, under Connecticut appellate procedure, not obligated to print the relevant evidence. Connecticut practice quite explicitly provides that where an appeal is taken from the denial of such a motion, the appellant has an option to print the relevant evidence in an appendix or not print it. (Appendix, pages 2a, 3a). Petitioner availed himself of this option and did not print an appendix containing evidential matter. The State of Connecticut also did not file such an appendix even though the choice of the appellant not to do so shifted the burden of providing an appendix to the Appellee. (Appendix, pages 2a, 3a). Where an appellant exercises this option and the appellee nonetheless neglects to provide an appendix, the law of Connecticut is that this failure by the appellee is reversible error. *Smith v. Waterbury Housing Authority,* 144 Conn. 13.

Nowhere in the original opinion of The Supreme Court of Errors is there any discussion of the law quoted above which applied. Only after appellant filed a motion for rehearing, (Appendix, page 12a), did the Court deal with the *Smith Case.* (See Appendix, page 15a).

The opinion of the Supreme Court of Errors as amended seems to state that petitioner does not fall under the rule of "Smith" because the assignment of errors filed by peti-

tioner did not, as in "Smith," advance the claim that the verdict was not supported by the evidence, that in fact the phraseology of the assignment of errors confined petitioner to the claim that error existed on the face of the record. As a result, the Court held that no error existed on the face of the record and would not consider whether or not the denial of the motion to set aside the verdict constituted error in light of the evidence.

The Court's opinion, therefore, reduces this matter to a simple question, i.e. was the phraseology of petitioner's assignment of errors such as to place him outside the rule of "Smith" because under Connecticut practice such phraseology raises not an evidential question but rather one of law on the face of the record?

The Supreme Court of Errors either misconstrued existent Connecticut law as to the effect of petitioner's phraseology or created new law of an ex post facto nature in ruling as it did. This is so for the following reasons:

1.) There is no law, statutory or case, nor any procedural section, to the knowledge of petitioner, in Connecticut, which places such an interpretation on the phraseology involved. It is highly indicative that the Supreme Court of Errors, when in its opinion as amended it distinguished "Smith," cited nothing in support of the distinction claimed. (Appendix, page 15a).

2. Under Connecticut practice, where an appellant *does* wish to assign error on the face of the record, specific forms are provided in the Connecticut Practice Book. None of the forms provided therein employ the phraseology utilized by appellant or any reasonably similar variation thereon. (Appendix, page 3a).

3.) In the only case known to petitioner wherein the effect of similar phraseology was considered by the Supreme Court of Errors, the Court held that the following assignment of error was proper:

"The Court erred:

1. In denying the motion to set the verdict aside as contrary to law."
(Appendix, page 4a)

As to the claim that the phrase "as contrary to law" kept the above assignment from being considered, the Supreme Court of Errors said:

> "Upon an appeal from the denial of such a motion we do not require more than an assignment of error that the motion was denied." *Nagel v. Modern Insurance Corp.*, 132 Conn. 698, at 699.

The sections of the then applicable practice book therein cited by the Court did not materially differ from the one involved herein. (Appendix, pages 3a-4a).

B. Petitioner's claim was that the verdict of the jury should have been set aside because of its inconsistency. The jury found that the defendant Prete was not guilty and at the same time found the other defendants, including petitioner, guilty. The jury so found despite the fact that all of the state's evidence was supportive of only one conspiracy, namely one to stage a fraudulent accident which involved Prete as the driver of the vehicle which collided with the one containing all of the other defendants. Petitioner alleged that no evidence was adduced at all indicating any other conspiracy than one which included Prete, and that this verdict therefore amounted to a logical absurdity, for if Prete was the sine qua non of the only conspiracy alleged and supported by evidence, and the jury found that he was innocent of conspiring, then to find the other defendants guilty was to find that they conspired with one who did not conspire with them. Consequently petitioner had to establish that no evidence was introduced indicating any other conspiracy than one necessarily involving Prete before he could pose on appeal to the Supreme Court of Errors the legal question of whether or not such a verdict should properly have been set aside. Any evidence at trial supportive of a conspiracy excluding

Prete, where the striking vehicle was to have been driven by an unknown third party, a known third party not a defendant, or one of the defendants, would have kept petitioner from raising this question of law because then the jury would have had a logical basis on which to convict all defendants but Prete. Since it was conceivable that such evidence could have been introduced by any witness for either the State or the defense, on either direct or cross-examination, it was imperative that the petitioner provide the Supreme Court of Errors with a complete transcript of the evidence at trial. This was done. Had the petitioner, therefore, chosen to provide an appendix of the evidence relevant to his argument, instead of opting to print none of it in an appendix, he would have had to have the entire transcript printed at great cost. The trial transcript contained 336 pages.

The opinion of the Supreme Court of Errors does not even mention that a complete, certified trial transcript was before it on appeal.

Assuming arguendo that petitioner's assignment of errors had been improperly phrased to raise an evidential point, certain factors nonetheless illustrate the unconstitutional nature of the refusal of the Supreme Court of Errors to hear petitioner's matter on the merits:

1.) The State was not misled or in any way surprised or put at a disadvantage by the procedure followed by petitioner. It is clear that the State presumed the matter to be one involving evidence; the State so argued in its brief. (Appendix, page 9a). In a civil matter where a party was not misled, the Supreme Court of Errors showed its willingness to overlook procedural irregularities. *Vignone v. Pierce & Norton Co., Inc.*, 130 Conn. 309, 311. Moreover in a criminal appeal taken by the *State*, the State was allowed to amend the appellate record to include a partial transcript of trial proceedings on the ground that this did not prejudice the defendant. *State v. Kreske*, 130 Conn. 558, 562-563.

2.) The Supreme Court of Errors has discretion to consult the trial transcript where for any reason the appellate record is insufficient and it has done so recently where just disposition of the appeal required. *State v. Nash,* 149 Conn. 655, 663; *State v. Bill,* 146 Conn. 693, 694.

3.) Since a complete trial transcript had been filed, and since the most efficient means of presenting petitioner's argument required that the Court read the entire trial proceedings, the position taken by the Supreme Court of Errors was that, in effect, a criminal appeal would not be heard on the merits only because the Court had a typed rather than a printed trial transcript.

C. The Supreme Court has held that a right of review in criminal cases by an appellate court is not an essential element required by the Due Process Clause of the Fourteenth Amendment, but where a right of appeal is given, the proceedings in the appellate court must be considered in determining whether or not due process has been denied. *Cole v. State of Arkansas,* 333 U.S. 196; *Frank v. Magnum,* 237 U.S. 309.

The Due Process Clause, in its procedural aspects, requires that a party have an opportunity to be heard and that this hearing be full and reasonable. *Dohany v. Rogers,* 281 U.S. 362.

While it is true that the Supreme Court will not usually find a failure of due process of law where the matter concerns state procedure, it is clear that the Court will do so where the supreme court of a state has not acted consonant with its own procedure, and, in certain circumstances, even where it has. *Allen v. Georgia,* 166 U.S. 138.

In *Wright v. Georgia,* 373 U.S. 284, the Supreme Court refused to not consider the constitutional question raised on the ground that the Georgia Supreme Court had an adequate procedural state ground for its not hearing the

constitutional question. The Supreme Court stressed that the Georgia procedural requirement that briefs must ratify the assignments of error was "an arid ritual," 373 U.S., at 291, and found further that no prior Georgia case had given notice of the existence of any such specific requirement. 373 U.S., at 291.

In *Rochin v. California*, 342 U.S. 165, the Court said that regard for due process

> "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." 342 U.S., at 169.

Petitioner claims that the Supreme Court of Errors changed the relevant procedural rules in its opinion and refused petitioner a hearing on the merits despite his total compliance with the procedure as it was while he perfected his appeal. It is analogous to *Brinkerhoff-Faris Trust & Savings Company v. Hill*, 281 U.S. 673.

Petitioner further claims that even if he had the obligation of filing an appendix, a refusal to hear his matter on the merits was violative of the Due Process Clause where:

1. He filed a full, certified trial transcript;

2. Any appendix filed would have to have been of the full trial transcript containing 336 pages;

3. The state was not misled;

4. The Supreme Court of Errors had discretion to read the transcript in place of the appendix; and where

5. The appeal concerned a criminal conviction.

Conclusion

For the foregoing reasons it is respectfully submitted that the Petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD S. LEVIN
DONALD J. CANTOR
JACOB A. SAXE
Attorneys for Petitioner
101 Lafayette Street
Hartford, Connecticut

October, 1964

APPENDIX

General Statutes of Connecticut, 1963 Supplement, Section 51-16a

SEC. 51-16. ACQUISITION, PUBLICATION AND DISTRIBUTION OF OFFICIAL LEGAL PUBLICATIONS. (a) There shall continue to be a commission to acquire, publish and distribute and to maintain for the benefit of the state a sufficient supply of the official legal publications, which are defined as the Connecticut Reports and advance parts thereof, the Phillips Connecticut Digest and the cumulative supplements thereto, the Connecticut Law Journal, the Connecticut Supplement, *the Connecticut Circuit Court Reports,* the digest of Connecticut Supplement *and circuit court* decisions and cumulative supplements thereto, the Connecticut Practice Book and cumulative supplements thereto and such additional publications pertaining to the state judicial department, the state-maintained courts and the practice of law as may be assigned to it. The commission is declared to be an agency within the judicial department and shall be known as the commission on official legal publications. It shall be composed of the chief justice of the supreme court of errors, who shall be chairman, ex officio; a judge or former judge of said court and a state referee, both of whom shall be appointed by the chief justice; the executive secretary of the judicial department, and the reporter of judicial decisions. It may appoint a selling agent or agents to handle the sales, and a publishing agent or agents to attend to the publication and distribution, under its supervision, of official legal publications, upon such terms as it deems to be for the best interest of the state. Except to the extent that the commission otherwise appoints, the executive secretary of the judicial department shall be the commission's publishing agent.

Connecticut Practice Book 1963

Section 718

SEC. 718. ——MOTION CONCERNING VERDICT; MATERIAL FACT FOUND WITHOUT EVIDENCE

If a party claims error in a decision of the trial court on a motion to set aside a verdict or on a motion under Sec. 255 for a judgment notwithstanding the verdict or notwithstanding the failure of the jury to return a verdict on the ground that there was no evidence to support the verdict, decision or claim of the adverse party in an essential particular, or if a party claims that the trial court found a material fact without evidence, he may either state that claim in his brief and print no evidence or he may print all relevant evidence; but if he adopts the first alternative or if the evidence he prints does not fairly present the issue, this court, in addition to any other appropriate order, and whether or not he prevails on the appeal, may direct him to pay to the adverse party so much of the expense incurred by the adverse party in the procuring and printing of evidence as is unjustifiably caused thereby. (P. B. 1951, Sec. 447; 1963.)

Maltbie, Connecticut Appellate Procedure, Second Edition, Section 330

SEC. 330. APPENDICES; WHEN NECESSARY; CORRECTION OF FINDING; CLAIM THAT NO EVIDENCE SUPPORTS DECISION; COSTS

Except in certain types of cases heretofore considered, any evidence which a party desires to present to the court must be printed in an appendix to his brief. The rule goes on to state that, if a party claims that a fact should be found on the ground that it is admitted or undisputed, he must print the evidence in such an appendix; but if, on the other hand, he claims that a fact is found without evidence, or that there was no evidence to support a verdict on an appeal from a ruling on a motion to set it aside, or where judgment was entered notwithstanding the verdict or if no verdict was rendered, he has an option. He may either

print all the relevant evidence or he may simply make the claim in his brief and leave it to the adverse party to print any evidence supporting the finding or decision of the court; but if he chooses the first alternative and unjustifiably requires his adversary to print evidence, or, if he chooses the second alternative but the evidence he prints does not fairly present the issue to the court, and his adversary is thereby compelled to print other testimony, even though he prevails, the expense of printing evidence to which his adversary is put is to be set-off against the costs to which he would otherwise be entitled.

Connecticut Practice Book, 1963
Forms 605 A

605

ASSIGNMENT OF ERRORS

A

Errors Apparent on the Face of the Record

The court erred:

1. In overruling the demurrer to the first, second and third paragraphs of the complaint.

2. In sustaining the demurrer to the first defense in the answer.

3. In that the complaint does not warrant the judgment, because (*Specify reasons*).

4. In that the facts stated in the judgment do not support the judgment rendered, because (*Specify reasons*).

Connecticut Practice Book, 1934
Form 650

650

ASSIGNMENT OF ERRORS, ON APPEAL FROM DECISION OF MOTION TO SET VERDICT ASIDE

The court erred:

1. In denying the motion to set the verdict aside as against the evidence.

2. In denying the motion to set the verdict aside as excessive.

Assignment of errors in an appeal of this nature must be filed with the appeal. Sec. 338. If the appeal is from the denial of the motion, and it is to be claimed that the verdict was excessive, this must be specifically assigned. Sec. 369.

***Nagel v. Modern Insurance Corp.*, 132 Conn. 698**

Assignment of Error

DEFENDANT'S APPEAL

In the above entitled case the defendant appeals from the denial of its motion to set the verdict aside.

The Defendant,
THE MODERN INVESTMENT CORPORATION,
By SACHS, SACHS & SACHS,
Its Attorneys.

I certify that foregoing appeal was filed on the 21st day of May, 1945; that the defendant has paid the record fee of the Supreme Court of Errors; and that Joseph I. Sachs is recognized in the sum of One Hundred and Fifty ($150.00) Dollars conditioned that said defendant shall prosecute said appeal to effect and pay all costs therein if it shall fail to do so; and said appeal is hereby allowed.

HENRY C. HIGGINS, Clerk.

[Filed May 21, 1945, HIGGINS, Clerk.]

ASSIGNMENT OF ERRORS

The Court erred:

1. In denying the motion to set the verdict aside as contrary to law.

Filed December 1, 1961.

STATE

vs.

VINCENT JOSEPH.

Motion to Set Aside Verdict

The Defendant hereby moves to set aside the verdict rendered in the above case because

1. It is contrary to law.
2. It is against the evidence.

HARRY G. KAMINSKY,
Attorney for Defendant.

Filed December 1, 1961.

STATE OF CONNECTICUT
vs.
LUPO, ARVISAIS, JOSEPH, KEATING, AND PRETE.

Superior Court,
Hartford County,
January 15, 1962.

Memorandum of Decision on Motions to Set Aside Verdicts of Guilty

These motions are based primarily upon the proposition that the finding of not guilty as to the defendant Prete necessarily involved a finding by the jury that there had not been a "faked" accident, and upon the further proposition that if there was no "faked" accident the State had failed to prove the conspiracy as to which it offered evidence.

The first proposition is not necessarily sound. It is of course idle to speculate upon the reasoning behind the

jury's conclusion as to Prete's freedom from guilt; but, to suggest one possibility, the jury might have found that although Prete agreed to stage the "faked" accident he did not do so for the purpose of obtaining money by false pretenses and, what is of more importance, he did not know that the purpose of the accident was to enable the other defendants to file fraudulent claims against the insurance companies involved.

Be that as it may the complete answer to the defendants' argument is to be found in the language of Judge Learned Hand in *United States vs. Austin-Bagley Corporation*, 31 F. Sec. 229:—

> "Upon that assumption there undoubtedly results a rational inconsistency between the verdicts; the conviction finds that the appellants have done what they could not have done alone; the acquittal, that their inevitable accomplices did not share in it with them. If we were limited to a rational reconciliation we might perhaps have to say that neither finding could stand, because, as we could not choose between them the doubt would infect both. But we are not so limited; the verdict in either case may have been the result of considerations not rational at all. With that possibility, so far as it touches the acquittal, we are not concerned, because the appellants have no vested right in the punishment of their fellows, however guilty. We need only consider whether there is any indication that the jury was improperly moved to acquit, and upon that question the acquittal throws no light whatever."

See also, *United States vs. Samuel Dunkel and Company*, 284 F. Sec. 894. The motions of the defendants Arvisais, Joseph, Keating and Lupo to set aside the verdicts of guilty against each of them, are denied.

COMLEY, *J.*

Filed January 16, 1962.

No. 24249
STATE OF CONNECTICUT
vs.
VINCENT JOSEPH

Superior Court,
County of Hartford,
April 17, 1963.

Assignment of Errors

ERRORS IN CONDUCT OF A JURY TRIAL

The Court erred:

1. In denying the defendant's motion to set aside the verdict because the said verdict, as described in paragraph 100 of the Finding, was fatally inconsistent as a matter of law.

2. In admitting the testimony of the defendant despite proper objection and exception as stated in paragraphs 82, 83 and 84 of the Finding.

Defendant,
By DONALD J. CANTOR,
His Attorney.

Filed April 18, 1963.

Finding

100. The jury returned a verdict of guilty against the accused Lupo, Arvisais, Keating and the defendant Joseph. The accused Kania had pleaded guilty and had testified for the State. The accused Prete was found not guilty by the jury.

SUPREME COURT OF ERRORS

April Term, 1964

STATE OF CONNECTICUT *v.* JOHN KEATING

STATE OF CONNECTICUT *v.* VINCENT JOSEPH

Information charging the defendants and others with the crime of conspiracy to obtain money by false pretenses, brought to the Superior Court in Hartford County and

tried to the jury before *Comley, J.*; verdict and judgment of guilty and appeal by the defendants. *No error.*

Joseph F. Skelley, Jr., special public defender, for the appellant (defendant Keating).

Donald J. Cantor, with whom, on the brief, were *Richard S. Levin* and *Jacob A. Saxe*, for the appellant (defendant Joseph).

George D. Stoughton, assistant state's attorney, with whom, on the brief, was *John D. LaBelle*, state's attorney, for the appellee (state).

HOUSE, J. John Keating and Vincent Joseph, the appellants in these two cases, were tried with Armand Lupo, Roland Arvisais, and Augustine Prete by a jury on a short-form information, authorized by Practice Book, 1963, § 493, charging that they and others conspired to obtain money by false pretenses. The offense was not otherwise specified except that each of them "did combine, confederate and agree with one another, and with others to said [the State's] Attorney unknown, to obtain money by false pretenses, in violation of Section 53-360 of the General Statutes, Revision of 1958; and in pursuance of said conspiracy one or more of said conspirators did do certain acts in furtherance of said combination, confederation and agreement, all in violation of Section 54-197 of the General Statutes, Revision of 1958." George Kania, another alleged conspirator, pleaded guilty and testified for the state. The jury returned a verdict of guilty as to each of the appellants and Lupo and Arvisais but not guilty as to Prete. Motions to set aside the verdict filed by each of the appellants were denied by the court, and they have appealed. Each has assigned as error the court's denial of his motion to set aside the verdict on the ground that it was fatally inconsistent as a matter of law. The common assignment of error presents the same question and will be first examined before consideration of Joseph's additional assignment of errors as to rulings on evidence.

It is the claim of the appellants that the alleged conspiracy involved an agreement between all the accused conspirators whereby a milk truck driven by Prete would collide with an automobile in which the others were riding, whereupon fraudulent claims of injuries would be presented to collect insurance. It is the contention of the appellants that in such a conspiracy a verdict of guilty in the case of the appellants and not guilty in the case of Prete is fatally inconsistent as a matter of law.

This court can decide the merits of an appeal only on the record as it is presented. *Cohn v. Mt. Zion Baptist Church,* 130 Conn. 362, 366, 34 A.2d 129. Upon the common assignment of error claimed, the sole question presented is whether the verdict as rendered is inconsistent as a matter of law. Nevertheless the briefs of both the appellants and the state argue inconsistency as a question of fact and refer to the evidence offered at the trial. On this issue, there is no appendix containing the evidence relied on in the briefs. Any portion of a transcript of evidence which a party desires this court to consider must be printed or stated in narrative form in an appendix to the brief. Practice Book, 1963, §§ 716, 718, 720-22; *State v. Pundy,* 147 Conn. 7, 9, 156 A.2d 193; *State v. Mendill,* 141 Conn. 360, 361, 106 A.2d 178; *Marciniak v. Wauregan Mills, Inc.,* 139 Conn. 264, 267, 93 A.2d 135; Maltbie, Conn. App. Proc. § 331. A ruling on a motion to set aside a verdict is tested by the evidence and not by the finding. *State v. Devine,* 149 Conn. 640, 654, 183 A.2d 612; Maltbie, Conn. App. Proc. § 185, p. 227. In the absence of any appendix containing relevant evidence, we have no factual basis on which to test the decision of the trial court in denying the motions to set aside the verdict. Without such evidence there is nothing in the record from which this court can determine whether or not the verdict was inconsistent as a matter of fact. Hence, we have no occasion to consider the rationale of the court's memorandum of decision or the rule of such cases as *United States v. Austin-Bagley Corporation,* 31 F.2d 229 (2d Cir.), cert. denied, 279 U.S. 863,

49 S. Ct. 479, 73 L. Ed. 1002, which is attacked by the appellants and relied on by the state.

Strictly as a matter of law on the record, there is no inconsistency in the verdict. In testing the verdict for inconsistency as a matter of law, we are necessarily limited to an examination of the offense charged in the information and the verdict rendered thereon without regard to what evidence the jury had for consideration. The information alleges a general conspiracy among six named persons, who allegedly agreed with one another and with others unknown to obtain money by false pretenses. There is nothing in the information to indicate that the acquittal of any one or more of the persons accused is inconsistent with a finding of guilt on the part of another accused. Accordingly, we find no error in the denial of the motions of these two defendants to set the verdict aside on the ground that it was inconsistent. Since this is the sole ground of appeal in the Keating case, the judgment as to Keating is affirmed.

Joseph has also attempted to attack certain evidential rulings by the trial court. The question is not correctly raised inasmuch as there is no proper assignment of error. Joseph's second assignment of error states that the court erred "in admitting testimony of the defendant despite proper objection and exception" as stated in three paragraphs of the finding. These three paragraphs merely recite certain facts which the state claimed to have proved in part by the contested introduction of certain evidence. Practice Book, 1963, § 648 provides that when error is claimed in rulings on evidence the draft finding and finding shall state in each instance, in a separate paragraph, the question, the objection, the answer, if any, and the exception. An assignment of error on an evidential ruling should refer to such a finding. Practice Book, 1963, § 651. There has not been a compliance with these rules.

Subsequent to the filing of the assignment of errors, the trial court corrected the finding so that the added para-

graphs properly set out, as suggested by Practice Book, 1963, § 648, the portion of the transcript necessary to review a ruling on evidence. Joseph did not, however, assign as error the evidential rulings recited in these paragraphs. If he intended to attack these rulings, then, after the finding was corrected, he should have amended his assignments of error in order to attack the contested rulings on evidence in the added paragraphs. Practice Book, 1963, §§ 626, 636, 710; Maltbie, Conn. App. Proc. § 177.

Notwithstanding this state of the record, it does appear that Joseph intended to contest in this appeal the admissibility of certain questions directed to him on cross-examination and designed to impeach his credibility. This portion of the cross-examination is recited in a paragraph of the corrected finding as to which, however, no assignment of error is made. We will do no more than to note that it is proper to attack a witness' credibility by evidence of his materially inconsistent statements. *State v. Walters,* 145 Conn. 60, 66, 138 A.2d 786. Also, once a defendant in a criminal case has taken the stand, he subjects himself to the risk of impeachment. *State v. Reid,* 146 Conn. 227, 232, 149 A.2d 698. A trial court has wide discretion both as to the allowance of questions involving relevancy and remoteness and as to the scope of cross-examination to show contradictory statements. *Steiber v. Bridgeport,* 145 Conn. 363, 366, 143 A.2d 434; *Eamiello v. Piscitelli,* 133 Conn. 360, 370, 51 A.2d 912; *State v. Kelly,* 77 Conn. 266, 269, 58 A. 705. It does not appear that there was any abuse of such discretion in this instance.

There is no error in either case.

In this opinion the other judges concurred.

No. 5497

STATE OF CONNECTICUT

vs.

VINCENT JOSEPH

Supreme Court,
State of Connecticut,
May 20, 1964.

MOTION TO REARGUE

In accordance with Sec. 703 of the Conn. Practice Book, 1963, the defendant hereby moves for permission to reargue the above captioned matter and, pursuant thereto, states as follows:

1. In the above matter, the defendant Joseph assigned as error the refusal of the trial court to uphold the defendant's motion to set aside the verdict because the said verdict was fatally inconsistent as a matter of law. Under these circumstances defendant had an option to print all the relevant evidence or simply make a claim in his brief that no such evidence existed, which the defendant in fact did, and that in so doing it was then up to the adverse party to print any evidence "supporting the finding or decision of the court". *Maltbie, Connecticut Appellate Procedure* (Second Edition), Sec. 330; *Connecticut Practice Book,* (1963) (Sec. 718); *Connecticut Practice Book,* (1951) (Sec. 447). *Smith vs. The Housing Authority of the City of Waterbury,* 144 Conn. 13, 14 (1946), makes it clear that where the appellant opts to state in his brief the claim that the court erred in refusing to set aside the verdict and further opts to present no evidence it thereupon devolves upon the adverse party to file an appendix incorporating all of the evidence which is relied upon to sustain the verdict below. Where the adverse party fails to provide the Supreme Court with such an appendix, the above case holds that error must be found in the denial of the motions below to set aside the verdict. Consequently the court in this matter, because of the fact that no appendix was provided by the State, should find error and order a new trial irrespective of the substantive issues involved.

2. Defendant relied upon the case of Smith vs. The Housing Authority of the City of Waterbury, as well as upon the sections above cited in preparation of the said appeal, which constitute the applicable law of Connecticut, and the decision rendered in this matter which is contrary to such applicable law deprives the defendant of his right

to due process of law as guaranteed him by the constitution of the United States.

The defendant also states as follows:

1. By decision announced May 19, 1964, in the said matter, the Supreme Court of Errors held that since no appendix was included in the defendant's brief containing evidence to substantiate the claim of inconsistency, the Court had "no factual basis on which to test the decision of the trial court in denying the motions to set aside the verdict." The court thereupon tested the verdict for inconsistency only as a matter of law and did not consider the question of whether or not the verdict was inconsistent as a matter of fact.

2. The defendant's argument that the verdict rendered in the trial court was inconsistent as a matter of fact rested upon the claim of the defendant that there was no evidence admitted at trial which indicated the existence of any other conspiracy save a conspiracy which included the accused Prete, who was found by the jury to be not guilty. The defendant, therefore, was attempting to establish the negative proposition that none of the testimony at trial and none of the exhibits admitted into evidence supported even an inference that any other conspiracy existed except the one necessarily involving the accused, Prete. Consequently, in order to provide the Court in appendix form with all of the evidence which was relevant to the defendant's claim of factual inconsistency, it would have been necessary for defendant to include in his appendix the testimony, both direct and cross, of every witness who testified at trial.

3. Defendant's counsel filed with the Clerk a copy of the entire transcript of the defendant's trial.

4. The said transcript contained 336 pages. To have printed same in an appendix would have involved prohibitive cost. To have included in an appendix the entire transcript in narrative form would have also involved large

cost but would also have been an improper manner of presenting testimony where the claim was that none of the testimony could possibly have supported a particular inference.

5. The decision of the Supreme Court in the instant matter makes no mention of the fact that the transcript was filed or of the unusual circumstances surrounding this matter which led counsel to file the said transcript, nor does the said opinion consider Section 404 of the Connecticut Practice Book of 1951.

6. The decision of the Supreme Court, resting wholly on the procedural ground referred to above, in effect denies the defendant Joseph his day in court and the opportunity to have the substantive issue which determines whether or not he is a criminal decided.

The defendant therefore prays that the Court grant his motion to reargue.

Defendant,

By DONALD J. CANTOR,
His Attorney

This is to certify that on this 20th day of May, 1964, a copy of the foregoing Motion was filed in hand with:

William S. Locke, Reporter of Judicial Decisions
Supreme Court of Errors
City of Hartford, County of Hartford,
State of Connecticut

JACOB A. SAXE,
Attorney at Law
101 Lafayette Street
Hartford, Connecticut 06106

This is to certify that on this 20th day of May, 1964, eight (8) copies of the foregoing Motion were filed in hand with:

Dominic A. DeCorleto, Clerk
Superior Court
County of Hartford, State of Connecticut

JACOB A. SAXE,
Attorney at Law
101 Lafayette Street
Hartford, Connecticut 06106

May 26, 1964

SUPREME COURT OF ERRORS

April Term, 1964

STATE OF CONNECTICUT *v.* JOHN KEATING

STATE OF CONNECTICUT *v.* VINCENT JOSEPH

AMENDMENT TO OPINION

Paragraph three of the opinion, make sentence three read: "That assignment advanced no claim that the verdict was not supported by the evidence, as was claimed in *Smith v. Housing Authority,* 144 Conn. 13, 14, 127 A.2d 45, but nevertheless the briefs of both the appellants and the state argue inconsistency as a question of fact and refer to the evidence at the trial."

MEMO TO:

May 26, 1964

John D. LaBelle, State's Atty.
Donald J. Cantor, Esq.

Re: 5497 State of Connecticut vs. Vincent Joseph

May 26, 1964. The motion by the defendant for reargument is denied.

By the Court,
KING, C. J.

DOMINIC A. DICORLETO

From Office of Dominic A. DiCorleto
Clerk of Supreme Court; Clerk of Superior Court
County Clerk, Hartford County
Drawer D, Station A
Hartford 1, Connecticut

NOV 14 1964

JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 589

VINCENT JOSEPH, *Petitioner*

vs.

THE STATE OF CONNECTICUT, *Respondent*

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF CONNECTICUT

JOHN D. LABELLE
State's Attorney
95 Washington Street
Hartford, Connecticut

GEORGE D. STOUGHTON
Assistant State's Attorney

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OPINION BELOW

The opinion of the Supreme Court of Errors of the State of Connecticut appears in the Appendix to the petitioner's brief starting on Page 7a. It is reported in 151 Conn. 592, 200 A. 2d 724.

JURISDICTION

The judgment of the Supreme Court of Errors of Connecticut was entered on May 19, 1964. Jurisdiction is invoked pursuant to 28 U.S.C., 1257 (3).

STATUTORY AND OTHER PROVISIONS

Connecticut General Statutes, Revision of 1958:

Section 51-16	Petitioner's Appendix p. 1a
Section 52-264	Appendix p. A-1

Connecticut Practice Book of 1934

Section 362	Appendix p. A-3
Section 370	Appendix p. A-4

Connecticut Practice Book of 1963

Section 612	Appendix p. A-1
Section 641	Appendix p. A-2
Section 713 (d)	Appendix p. A-3
Section 718	Petitioner's Appendix p. 2a

QUESTION PRESENTED

Did the decision of the Connecticut Supreme Court of Errors that a verdict of guilty against the petitioner was not inconsistent as a matter of law, and its refusal to consider a claim that the verdict was not supported by the evidence, rest upon an independent and adequate state ground where the assignment of error relied upon by the petitioner was simply that the verdict "was fatally inconsistent as a matter of law?"

STATEMENT OF THE CASE

Vincent Joseph and others were tried on an information charging that they and others conspired to obtain money by false pretenses. Joseph and all of the other defendants except Augustine Prete were passengers in an automobile which was struck by a truck driven by Prete. The conspiracy involved an agreement between all of the conspirators under which the truck was to collide with the automobile, whereupon fraudulent claims of injuries were presented to collect insurance. The jury returned a verdict of guilty as to each of the alleged conspirators except Prete, who was found not guilty. A motion to set aside the verdict was denied by the Court and an appeal was taken. Joseph assigned as error the Court's denial of his motion to set aside the verdict on the ground that it was fatally inconsistent as a matter of law. (Petitioner's Appendix p. 7a) The Supreme Court of Errors of the State of Connecticut found no error.

ARGUMENT

The petitioner disagrees with the Judges of Connecticut in their interpretation of their Rules of Practice.

The rules concerning appeals are made by the judges. Sec. 52-264 General Statutes of Connecticut, Revision of 1958 (App. p. A-1)

Section 612 of the Connecticut Practice Book (App. p. A-1) requires that assignments of error be in substantial conformity with the Forms provided in the Practice Book.

The relevant part of Form 605 C reads as follows:

Errors in the Conduct of a Jury Trial

The Court erred:

1. In denying the plaintiff's (or defendant's) motion

to set the verdict aside (if the attack on the verdict is because the damages are excessive or inadequate, this must be stated), because the damages are excessive (or inadequate); (if it is because the verdict is not supported by the evidence on the issue of liability and because it is excessive or inadequate, this must be stated), because the verdict is not supported by the evidence and because the damages are excessive (or inadequate).

The Connecticut Practice Book is published and distributed by a Commission under the authority of Section 51-16 of the General Statutes of Connecticut, Revision of 1958. (Appendix to Petitioner's Brief, p. 1a.)

The assignment of error relied upon by Petitioner did not follow the suggested Form.

In *Nagel v. Modern Investment Corp.*, 132 Conn. 698, 46 A. 2d 605, the case relied upon by Petitioner, the Supreme Court of Errors entertained an appeal based, in part, upon an assignment of error that the verdict was contrary to law. It was also claimed in that case that the verdict was against the evidence and that it was excessive. (App. p. A-5) It is entirely different to assert the claim, as in the case at Bar, that the verdict is fatally inconsistent as a matter of law.

At that time, Section 370 of the Rules of Practice provided that all of the testimony be printed in the Record, so that it was all before the Court (App. p. A-4)

The Rules make it perfectly clear that the ground relied upon for appeal must be stated in the assignment of errors. The ground stated by petitioner as that upon which he relies is that the verdict was fatally inconsistent as a matter of law. (Appendix to Petitioner's Brief, p. 7a) The Supreme Court of Errors held that the verdict was not so inconsistent. (Appendix to Petitioner's Brief, p. 7a *et seq.*)

Petitioner asserts that the Court should have interpreted his assignment of error to mean that the verdict was not supported by the evidence because he raised that argument in his Brief. Upon such a claim, the evidence must be printed for the Court by one party or the other, as required by Section 718 of the Connecticut Practice Book. (Appendix to Petitioner's Brief, p. 2a) He printed none of the evidence himself. He cannot shift the burden of printing evidence sufficient to support the verdict to the appellee, because he did not claim error in the decision of the trial court on a motion to set aside the verdict on the ground that there was no evidence to support the verdict. His claim was that the verdict was inconsistent as a matter of law.

Section 641 of the Connecticut Practice Book provides that a transcript of evidence be filed with the Clerk of the Court where testimony is required to present the issues. (App. p. A-2) This does not take the place of an appendix, and it is not before the Court as is stated in the Petitioner's Brief. Section 713 (d) of the Connecticut Practice Book provides for the printing of evidence in an appendix. (App. p. A-3)

It is simply not so to state that new law was created or that this case was decided by a Rule nonexistent at the time the appeal was being perfected. Very clearly, it was decided upon a procedural, non-Federal question.

Kammerer v. Kroeger, 299 U.S. 302, 81 L.ed. 253

Hedgebeth v. North Carolina, 334 U.S. 806, 92 L.ed. 1739

Also Annotation in 100 L.ed. 1200

CONCLUSION

It is respectfully submitted that the decision of the Supreme Court of Errors of the State of Connecticut rested upon an independent and adequate state ground which ought not to be reviewed, and that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN D. LABELLE
State's Attorney

GEORGE D. STOUGHTON
Assistant State's Attorney

APPENDIX

General Statutes of Connecticut, Revision of 1958, Section 52-264

Sec. 52-264. *Judges of supreme court to make rules for appeals and writs of error.* The judges of the supreme court of errors shall make such orders and rules as they deem necessary concerning the practice and procedure in the taking of appeals and writs of error to the supreme court of errors, and concerning the giving of security by the appealing party, stay of execution during the pendency of appeal, the payment of costs and the taxation of reasonable costs when the same have not been fixed by statute. (1949 Rev., S. 8012; 1957, P.A. 651, S. 32)

Connecticut Practice Book, 1963 Section 612

Sec. 612. *Assignment of Errors; When Filed*

If no finding of facts be necessary to present properly the questions raised upon the appeal, the appellant shall file his assignment of errors with his appeal. If a finding is necessary, he shall file his assignment of errors within ten days from the filing of the finding. Assignments of error shall be filed with the clerk with whom the appeal was filed, and shall be in substantial accordance with Forms 605 and 606.

If, after the appellant files a request for a finding or secures an extension of time to do so, but before a finding is filed, the appellant decides to abandon all phases of the appeal which would require a finding, he shall file with the clerk with whom the appeal was filed a notice to that effect, accompanied by his assignment of errors.

(P.B. 1951, Sec. 388; 1963.)

Connecticut Practice Book, 1963
Section 641

Sec. 641. *Filing Evidence in General*

If any testimony or proceedings note of which were taken by a reporter shall be required for the proper presentation of any of the issues upon an appeal, the appellant shall file with the clerk of the court where the judgment was rendered before or at the time he files his request for finding and draft finding or, if no finding is required, before or at the time he files his assignment of errors, except as otherwise provided in these rules, a transcript of so much thereof as is relevant and material to any of the issues upon the appeal. Upon the filing of the transcript the clerk shall give notice thereof to opposing counsel. If the appellant has filed or caused to be filed a transcript of only a part of the evidence or proceedings, the trial court may *suo motu* direct him to file any additional portions or all of it. An appellee may within ten days of the issuance of notice of the filing file any additional portions of the evidence or proceedings which he deems necessary. The transcript of evidence so filed shall be certified by the official reporter and the trial court. Each paragraph of the findings of subordinate facts or claims of proof in a draft finding and counter finding prepared pursuant to Secs. 613, 614, 615, 629, 630 and 631, and each paragraph of the part of a draft finding or counter finding which contains rulings on evidence pursuant to Sec. 648, shall include a reference to the page or pages of any transcript or transcripts filed pursuant to this rule where the evidence supporting the finding or proposed finding, or where the ruling, appears. Nothing herein contained shall relieve a party of the duty under Sec. 720 to refer in an appendix to a brief to appropriate pages of the transcript. (P.B. 1951, Sec. 404; 1963.)

Connecticut Practice Book, 1963
Section 713 (d)

Sec. 713. *Appellant's Brief*

The appellant's brief should contain the following:

* * * * *

(d) An appendix, which may contain such parts of the evidence on file as the appellant deems material to the questions presented.

* * * * *

(P.B. 1951, Sec. 445; 1963.)

Connecticut Practice Book, 1934
Section 362

Sec. 362. All assignments of error shall be specific and shall directly assert that the trial court committed error in the respects specified, in substantial accordance with Form No. 647, 648 or 650.

The statement should be so made as to avoid unnecessary prolixity or repetition.

It is never proper to repeat a request for a charge, or a statement of facts in respect to a ruling on evidence, or a ground of demurrer, which can be described by reference to a part of the finding in which it appears.

No further specification or recital should be made than such as is necessary to put the court, after an inspection of the whole record, fairly in possession of the particular points of law which the appeal is designed to raise.

Connecticut Practice Book 1934
Section 370

Sec. 370 amended to take effect September 1, 1943.

Upon an appeal from the action of the trial court in setting aside a verdict, partly or solely upon the ground that it is against the evidence, the court shall report all the evidence in such cause, except so much as the parties may stipulate to omit, to the Supreme Court of Errors, and make it a part of the record, without expense to the appellant for its transcription and printing if the appellant shall prevail, but, if and after he shall fail in his appeal, the expense of printing the record shall be paid by him to the clerk for the use of the State. Before printing the evidence, the clerk shall take from the appellant security, by bond or otherwise, for the payment of such expense should the appellant fail in his appeal.

Nagel v. Modern Investment Corporation
A-218

Connecticut Supreme Court Records and Briefs
p. 255

Assignment of Errors

The Court erred:

1. In denying the motion to set the verdict aside as contrary to law.

2. In denying the motion to set the verdict aside as against the evidence.

3. In denying the motion to set the verdict aside as excessive.

The Defendant

The Modern Investment Corporation

By Sachs, Sachs & Sachs
Its Attorneys

(Filed May 21, 1945, Higgins, Clerk.)